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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENT.

Petition for for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether the injury to the plaintiff school children found in 1974 justified a 1981 district court order which established a strict mathematical racial quota in layoffs of administrators and which voided the bona fide seniority rights of white school administrators guaranteed by a collective bargaining agreement and tenure rights under state law.

2. Whether procedural due process or section 703(h) of Title VII require a district court to make specific findings of fact to support an order depriving Petitioner's members of rights guaranteed by state tenure law and rights guaranteed by a bona fide seniority plan.

3. Whether the 1981 Order of the district court exceeded the limits of its remedial power in a public school desegregation case where it failed to eliminate a condition that violated the Constitution or flowed from such a violation.

4. Whether the 1981 Order "exceed[ed] appropriate limits" where it was not "... designed as nearly as possible 'to restore the victims of discriminatory conduct to the position which they would have occupied in the absence of such conduct.' "

5. Whether the 1981 Order voiding collectively bargained seniority rights, reversing a school committee decision to honor its agreement, and abrogating tenure rights under state law "... take[s] into account the interests of state and local authorities in managing their own affairs ...".

Opinion Below.

The opinion of the Court of Appeals, appears at Appendix A1. The transcript of the July 9, 1981 order of the United States District Court for the District of Massachusetts, appears at Appendix A17-22.

Jurisdiction.

The Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1) because the judgment and opinion of the United States Court of Appeals for the First Circuit was entered on February 17, 1982.

Constitutional Provision Involved.

Fourteenth Amendment, Section 1:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Statutory Provisions Involved.

1. 1964 Civil Rights Act, section 703(h), 42 U.S.C. § 2000 e-2(h):

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an

unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

2. Massachusetts General Laws Chap. 71 sec. 42A:

§ 42A. Rights of School Principals and Supervisors and Certain Other Persons in Cases of Demotion.

No principal, supervisor, assistant principal, or professional employee performing the duties of a principal, supervisor, assistant principal, by whatever title his position may be known, who has served in that position for over three years shall without his consent be demoted except for inefficiency, incapacity, unbecoming conduct, insubordination or other good cause; nor unless, at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his demotion is proposed; nor unless, if he so requests, he has been given a hearing before the school committee, which may be either public or private at the discretion of the school committee, and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless the superintendent shall have given the committee his recommendations thereon.

For the purpose of this section, a person shall be deemed to have been demoted if his salary has been reduced contrary to the provisions of section forty-three of this chapter or if he has been transferred without his

consent to a position wherein he no longer serves at discretion.

Any person who has been demoted by vote of a school committee under the provisions of this section may within thirty days after the vote of dismissal or demotion appeal therefrom to the superior court in the county in which he was employed. (1945, 330; 1953, 269; 1975, 199, approved May 9, 1975, effective 90 days thereafter).

3. Massachusetts General Law Chapter 150E.

The Massachusetts Public Employee Collective Bargaining statute creates enforceable collective bargaining rights. The statute is not reprinted as it is not specifically relied upon in the Petition.

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BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner Boston Association of School Administrators and Supervisors, AFL-CIO ("BASAS") respectfully prays that a writ of certiorari issue to review a February 18, 1982 judgment of the United States Court of Appeals for the First Circuit.[1]

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[1] The parties in the Court of Appeals were: a) plaintiffs—Tallulah Morgan, et al. as representatives of the class of plaintiffs which includes black public school students and their parents; b) four defendants—Boston School Committee, City of Boston, State Board of Education and State Commissioner of Education; c) four intervenors—Petitioner Boston Association of School Administrators

Statement of the Case.

This is a 1972 school desegregation case in which black children attending Boston public schools and their parents have sought to redress the denial of equal educational opportunity. Jurisdiction of the action was invoked under 28 U.S.C. § 1343.

In 1974 the district court found the Boston School Committee liable for the intentional segregation of the Boston schools along racial lines. *Morgan v. Kerrigan*, 379 F. Supp. 410 (D. Mass. 1974), *affirmed*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).[2]

In 1976 the district court issued its Order for the Desegregation of Administrative Staff. The Order affected administrative positions which are included in the BASAS bargaining unit. The 1976 Order, which appears at Appendix A23, was not appealed.

The 1976 Order required that administrative vacancies be filled according to a one black-one white ratio until the percentage of black administrators reached twenty percent.[3]

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and Supervisors, Boston Teachers Union, Concerned Black Educators of Boston and El comite de Padres. The A. Phillip Randolph Institute filed as an amicus curiae.

[2] The original findings of the district court which related to employment practices of the Boston School Committee appear in *Morgan v. Kerrigan*, 379 F. Supp. 410 at 456-466. The plaintiffs' principal claim was that "... defendants have knowingly pursued policies resulting in racial segregation of teachers and administrative personnel, thereby reinforcing the racial identifiability of schools and increasing the racial segregation of students." 379 F. Supp. at 456. The district court found adequate support for that claim.

[3] The 1976 Order established three administrative categories. Principals and headmasters comprised Category I. Categories II and III include assistant principals, assistant headmasters and various other administrative positions. Only Category I adminis-

The School Committee was further ordered to adopt recruitment policies in order to reach an ultimate goal of 25% black administrators although it was relieved of the one-to-one hiring obligation once the 20% goal was reached. By 1981 the percentage of black Category I administrators was 20.53.

Since 1975 Massachusetts law has required school committees to collectively bargain with their principals. The collective bargaining agreement between BASAS and the Boston School Committee contained an article which governed layoffs, and which required layoffs by "inverse order of seniority." Seniority was defined as an administrator's period of permanent service in the administrative position or the total period of service in the administrative position if the employee's acting service was continuous with permanent appointment. Section 3(a); Appendix A35.

The layoff clause provided no protection for administrators who were not tenured under Massachusetts law.[4] Nor did the layoff clause provide protection to acting administrators (i.e., administrators who had not been permanently appointed pursuant to the 1976 Order). The layoff clause required that these unprotected employees be laid off prior to the layoff of any protected (i.e., permanent *and* tenured) employee in the affected job category. Section 4(a) and (b); Appendix A36.

In 1981 the School Committee ordered twenty-eight schools to be closed in the 1981-1982 school year. These school closings necessitated a reduction of twenty-eight headmaster and principal positions. Thirteen positions were eliminated either because the positions were occupied by acting

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trators are involved in the present case. The 1976 Order also altered the process by which vacancies in administrative positions were permanently filled by providing community and parent input into that process.

[4] The Massachusetts administrator's tenure law, M.G.L. c. 71, § 42A (reprinted at page iii, *supra*), requires three years of service in order to be entitled to its protections.

employees or because the employee retired.[5] It was thus necessary to lay off fifteen permanently appointed Category I administrators.

The School Committee, on July 7, 1981, ordered that strict seniority be the layoff criterion. Using a seniority criterion, the percentage of black administrators would have been 13.8%.

The 1981 Order of the district court required that the twenty per cent level of minority administrators be maintained resulting in the layoff of seven permanent tenured white administrators in violation of state law and the collective bargaining agreement.[6] This Petition seeks review of the First Circuit's judgment affirming that Order.

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[5] Of these thirteen positions, five had been occupied by blacks and eight by whites. Accordingly, before any layoffs were effected, the percentage of black Category I administrators had dropped from 20.53% to 18.84%.

[6] The district court order resulted in the following individuals being laid off:

Name	*Position*	*Seniority Date/Race*
1. Richard Brown	Principal	8/21/79-B
2. Clare Joyce	Principal	8/21/79-W
3. Edmund Cardoni	Principal	8/25/78-W
4. William O'Connell	Principal	9/7/77-W
5. Thomas McLaughlin	Principal	9/7/77-W
6. Joseph Bage	Principal	4/25/77-W
7. Gerald McGrath	Principal	9/7/76-W
8. Virginia Duseau	Principal	9/1/76-W
9. Sally Gorham	Principal	8/16/76-W
10. John Gillis	Principal	8/16/76-W
11. Donald DeGrandis	Principal	8/16/76-W
12. Janet Short	Principal	8/16/76-W
13. Joseph Lee	Principal	8/16/76-W
14. Joseph McKeigue	Principal	8/16/79-W
15. Christopher Lane	Headmaster	8/21/79-W

Reasons for Granting the Writ.

THIS CASE PRESENTS A NUMBER OF IMPORTANT QUESTIONS OF FEDERAL SCHOOL DESEGREGATION AND EMPLOYMENT LAW WHICH SHOULD BE SETTLED BY THIS COURT.

I. WHETHER A STRICT MATHEMATICAL RACIAL QUOTA WHICH VOIDS BONA FIDE SENIORITY RIGHTS AND STATE LAW TENURE RIGHTS IS A PERMISSIBLE REMEDY IN A SCHOOL DESEGREGATION CASE.

The Court has approved the use of mathematical racial ratios only as a starting point in the process of eliminating a dual school system. The Court has expressly disapproved the use of racial quotas which require a particular degree of

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The School Committee order that seniority be the layoff criterion would have resulted in the following individuals being laid off:

Name	*Position*	*Seniority Date/Race*
1. Clare Joyce	Principal	8/21/79-W
2. Richard Brown	Principal	8/21/79-B
3. Callannye Thomas	Principal	8/25/78-B
4. Clifford Janey	Principal	8/25/78-B
5. Michael Fund	Principal	8/25/78-O
6. Edmund Cardoni	Principal	8/25/78-W
7. Curtis Wells	Principal	9/7/77-B
8. John Cunningham	Principal	9/7/77-B
9. William O'Connell	Principal	9/7/77-W
10. Thomas McLaughlin	Principal	9/7/77-W
11. Bernice Johnson	Principal	9/7/77-B
12. Joseph Bage	Principal	4/25/77-W
13. M. Tames Denniston	Principal	2/28/77-B
14. Dean Yarborough	Principal	2/28/77-B
15. Stacy Johnson	Headmaster	4/16/80-B

Accordingly, seven principals (McGrath, Duseau, Gorham, Gillis, DeGrandis, Short and Lee) who were laid off because of the district court order would not have been laid off under a seniority based layoff.

racial balance as a matter of substantive constitutional right. *Swann v. Board of Education*, 402 U.S. 1, 23-25 (1971); *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 433-435 1976). The 1981 Order of the district court voided the seniority rights and tenure rights of certain Boston principals solely on the basis of their race in order to meet a 20% racial ratio of black principals.

In *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). The Court approved an affirmative action plan which accorded racial preferences in selecting employees for a promotional training program because the plan did not "... unnecessarily trammel the interests of white employees." Moreover the rights asserted by Brian Weber, unlike the rights asserted by Petitioner, were not derived from a collective bargaining agreement because the affirmative action plan he challenged was itself created by the collective bargaining agreement. Finally, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) the Court invalidated a preferential admissions program that used race as the sole criterion for eligibility. While acknowledging that race may be taken into account in a university admissions program, Mr. Justice Powell made clear that the state bore a substantial burden of justification even when race was one of many criteria. *Id.* at 320.

II. Whether the Decisions of this Court Under Procedural Due Process and Section 703(h) of Title VII Require that the Abrogation of Tenure and Seniority Rights Be Supported by Specific Findings.

The Court's decision in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) established that as a prerequisite to the grant of retroactive seniority rights in contravention of the rights of otherwise senior members of a collective bar-

gaining unit, a district court must make specific findings that the beneficiaries of its order were victims of defendant's illegal action. In the absence of such specific findings all *bona fide* seniority systems are inviolate. The Petitioner's seniority system is clearly *bona fide* under the criteria announced in *Pullman-Standard* v. *Swint*, __ U.S. __, 50 U.S.L.W. 4425 (April 27, 1982). Moreover no contention was raised and no findings were made that the BASAS seniority system failed to meet the *Swint* criteria of neutrality, rationality in light of industry practice, freedom from a discriminatory genesis and freedom from illegal purpose.

Further *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and subsequent cases involving tenure rights of government employees establish that public employment is an entitlement which vests in its holders property rights which can be deprived only after notice and an opportunity to be heard. Thus constitutional and Title VII principles require a hearing in which the court makes factual findings and issues an appropriate remedy with consideration of the rights of employees to whose disadvantage such an order might run. The failure of the district court to make findings or to hold hearings prior to divesting employees of an entitlement invalidates the court's 1981 Order.

III. Whether the District Court Exercised Its Remedial Power to Eliminate a Condition which Violated the Constitution or which Flowed from such a Violation.

Milliken v. *Bradley*, 433 U.S. 267 (1977) required that school desegregation orders be aimed at the elimination of constitutional violations or conditions which flowed from such violations. The nature of the constitutional violation in the case *sub judice* was that the School Committee had formulated and implemented policies which had injured black

students by denying them an equal educational opportunity. The 1981 Order of the district court can be said to have satisfied the first *Milliken* critrion only if the plaintiffs are entitled, as a matter of substantive right, to an administrative staff which is 20% black.

The 1976 Order for the Desegregation of Administrative Staff was aimed at eliminating segregative employment practices. That Order defined a "shortage" of black administrators as less than 20%. The 1976 Order did not require displacement of existing employees and their replacement by newly hired black employees. It did however provide a racial preference in the form of a one-to-one hiring ratio until such time as the "shortage" was eliminated. The 1976 Order achieved the dual purpose of eliminating intentionally segregative employment practices and compensating the plaintiffs, through the hiring preference, for the injury caused by those practices.

The cure for the disease which was ordered in 1981, considering its impact upon wholly innocent employees, is far more severe than the racial preference provided in 1976 and is as destructive of constitutional rights as the School Committee's unconstitutional actions ten years earlier.

IV. Whether the 1981 Order Was Designed as Nearly as Possible to Restore the Victims of Discriminatory Conduct to the Position which They Would Have Occupied in the Absence of such Conduct.

There are two senses in which the second *Milliken* criterion bears on the case *sub judice*. The first sense measures the order by its impact on the plaintiff school children. The second measures the order by its impact upon the affected employees.

The victims of discriminatory conduct are the black school children who were denied equal educational opportunity. The Court of Appeals explained that the 1981 order benefited the plaintiffs by providing them with adult role models. There were no findings made that the plaintiffs required role models in order to be made whole. Indeed in 1974 the district court rejected the defendant's argument that "... assignment of black teachers to predominantly black schools is educationally justifiable because black teachers serve as adult role models and inspirational examples to black pupils." *Morgan* v. *Hennigan*, 379 F. Supp. 410, 460 (D. Mass. 1974). The Court of Appeals affirmed, citing the lack of record evidence on that point. *Morgan* v. *Kerrigan*, 509 F. 2d 580, 596 (1st Cir. 1974). Whatever force the role model thesis may have when applied to teachers is further diluted by its application to a systemwide administrative staff. Because there is only one principal in each school the benefit to the plaintiff black students of having a particular percentage of black principals accrues only to those students who happen to be in a school with a black principal.

The second sense in which the second *Milliken* criterion applies to this case is in a strictly employment context. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) authorized the use of retroactive seniority to restore specific victims of employment discrimination to the position on the seniority list that they would have occupied in the absence of such discrimination. The direct, make whole benefit to the employee victim justified the deprivation to the innocent white employee whose seniority status was thereby diminished. The case *sub judice* contains no employee victims who require retroactive seniority in order to be made whole. Black principals have been granted seniority rights superior to white principals not because they were victims but because they are black. The justification for this remedy is found only in the remote and indirect benefit accruing to the plaintiff students.

V. Whether the 1981 Order that Voided a Collectively Bargained Seniority Agreement, Reversed a School Committee Decision to Honor Its Agreement and Abrogated State Tenure Rights Took into Account the Interests of Local Authorities in Managing Their Own Affairs.

A federal court must take into account the interests of state and local authorities in managing their own affairs when it devises a remedy in a school desegregation case. *Milliken v. Bradley*, 433 U.S. 267, 281 (1977). The interest of local school authorities in managing and staffing their schools is fundamental. When local authority is displaced by state government, federal government or judicial decree local support for schools and local confidence in the educational system is eroded:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

While local control that violates the Constitution can claim no immunity from federal court order there has been no finding that the defendant school committee's employment practices relating to administrators have violated the Constitution since 1974. Indeed the record is quite the opposite. The Boston School Committee has not only remained free from subsequent violations but it, with the cooperation of Petitioner's members, has been engaged in one of the most difficult and extensive remediation programs in the history of the United States. When school closings in 1981 mandated a reduction in administrative force the school committee affirmed its obligation under an agreement negotiated pursu-

ant to state law. It also acted in accordance with a state tenure law passed by the Massachusetts legislature in 1945. The school committee's decision to adhere to seniority as the layoff criterion for principals was an acceptance of its primary responsibility to assess and solve its own problems. The imposition of the district court's judgment for that of the school committee failed to "... take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 281 (1977).

* * *

Finally, the facts upon which this Petition is based present an appropriate context for a clear and precise statement of governing principles. The case directly impacts only eight employees. The facts are not disputed. A decision by the Court in favor of Petitioner will not result in substantial disruption to the school system. Seven, perhaps eight,[7] employees will have to be reinstated to the positions from which they were laid off. The important issues raised by this case should be addressed in a discrete factual setting so that maximum guidance will be provided to the judiciary, employers and working people. This case offers an appropriate setting.

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[7] The eighth employee, Christopher Lane, was the only headmaster to be laid off. Lane had more total service than Stacy Johnson. See note 6, *supra*. Neither Lane nor Johnson had the three years of service necessary for state law tenure and protection against layoff under the collective bargaining agreement. Accordingly the School Committee could have retained Johnson without violating the BASAS agreement, thus producing a black Category I ratio of 14.6%.

Conclusion.

For the foregoing reasons the Petitioner respectfully prays that a writ of certiorari issue to review the February 17, 1982 judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS AND SUPERVISORS, AFL-CIO,

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